

2008

Hicks v. UBS Financial Services : Brief of Appellant

Utah Court of Appeals

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THOMAS G. HICKS, III,)	
an individual,)	
)	
Petitioner/Appellee,)	
)	
v.)	Case No. 20080950
)	
UBS FINANCIAL SERVICES INC.,)	
a Delaware corporation,)	
)	
Respondent/Appellant.)	

**APPEAL FROM THE THIRD DISTRICT COURT.
SALT LAKE COUNTY, STATE OF UTAH,
THE HONORABLE ROBERT P. FAUST
CIVIL NO. 080901999 (CONSOLIDATED WITH CIVIL NO. 080902321)**

Counsel for Respondent/Appellant

TABLE OF CONTENTS

	<u>Page</u>
STATEMENT OF JURISDICTION	1
STATEMENT OF ISSUES AND STANDARD OF REVIEW	1
DETERMINATIVE PROVISIONS	2
STATEMENT OF THE CASE	3
Nature of the Case	3
Course of Proceedings and Disposition Below	5
Statement of Facts	6
A. The FINRA Arbitration Process	6
B. The Parties' Arbitration Agreement	7
C. The Commencement of the Arbitration	8
D. Discovery in the Arbitration	10
E. The Evidentiary Hearing	13
F. The Award	15
G. The Trial Court Vacated The Award	15
SUMMARY OF ARGUMENT	18
ARGUMENT	20
I. THE TRIAL COURT INCORRECTLY EXERCISED ITS AUTHORITY IN VACATING THE AWARD ON THE SOLE BASIS THAT THE ARBITRATORS DID NOT PERMIT HICKS TO DEPOSE UBS'S CUSTO- DIAN OF RECORDS	20

II.	THERE WAS ABSOLUTELY NO BASIS IN THE RECORD FOR THE TRIAL COURT TO CONCLUDE THAT HICKS WAS DENIED “CRITICAL DISCOVERY”	25
III.	UTAH’S STRONG PUBLIC POLICY FAVORING ARBITRATION MANDATES THE REVERSAL OF THE TRIAL COURT’S DECISION VACATING THE AWARD	27
	CONCLUSION	30
	CERTIFICATE OF SERVICE	32
	ADDENDUM OF EXHIBITS	33

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<u>Allred v. Educators Mut. Ins. Ass’n of Utah</u> , 909 P.2d 1263 (Utah 1996).....	27
<u>Buzas Baseball v. Salt Lake Trappers</u> , 925 P.2d 941 (Utah 1996).....	28
<u>Hall v. Dep’t of Corrections</u> , 2001 UT 34, 24 P.3d 958	24
<u>Hall Street Associates, LLC v. Mattel, Inc.</u> , 552 U.S. ___, 128 S.Ct. 1396 (2008)	28
<u>Jenkins v. Prudential-Bache Securities, Inc.</u> , 847 F.2d 631 (10th Cir. 1988)	29
<u>Softsolutions v. Brigham Young University</u> , 2000 UT 46, 1 P.3d 1095	2
<u>Utility Trailer Sales v. Fake</u> , 740 P.2d 1327 (Utah 1987).....	28

Statutes

Utah Code Ann. § 78A-4-103(2)(j).....	1
Utah Code Ann. § 78B-11-110	3, 22
Utah Code Ann. § 78B-11-116	3, 19, 21, 22
Utah Code Ann. § 78B-11-116(3).....	3, 21
Utah Code Ann. § 78B-11-116(4).....	23, 24
Utah Code Ann. § 78B-11-118	2, 19, 23, 25
Utah Code Ann. § 78B-11-118(3).....	24
Utah Code Ann. § 78B-11-124	2
Utah Code Ann. § 78B-11-124(1).....	21, 22, 24

Utah Code Ann. § 78B-11-126	31
-----------------------------------	----

Others

FINRA Code of Arbitration Procedure for Industry Disputes § 13506	6
---	---

FINRA Code of Arbitration Procedure for Industry Disputes § 13510	7, 26
---	-------

The Arbitrator’s Manual, Securities Industry Conference on Arbitration (Aug. 2007), p. 12	7, 26
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STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to Utah Code Ann. § 78A-4-103(2)(j), as this matter was appealed to the Utah Supreme Court from a final judgment of the Third District Court (R. 411-12,¹ Addendum Exhibit 1.) The appeal was transferred by the Utah Supreme Court to this Court. (R. 34-35 (Case 2321).)

STATEMENT OF ISSUES AND STANDARD OF REVIEW

1. Whether the trial court incorrectly exercised its authority in: (a) denying the motion filed by Respondent/Appellant UBS Financial Services Inc. (“UBS”) for summary confirmation of a certain arbitration award (the “Award”) that was entered in favor of UBS by the three-member arbitration panel duly appointed by the Financial Industry Regulatory Authority (“FINRA”) and agreed upon by both parties; and (b) granting the motion to vacate the Award filed by Petitioner/Appellee Thomas G. Hicks, III (“Hicks”) on the sole basis that the trial court disagreed with the arbitrators’ decision not to grant Hicks’ request to depose UBS’s custodian of records. UBS addressed this issue below in its Motion for Summary Confirmation of Arbitration Award and supporting memorandum. (Memorandum Supporting UBS’s Motion for Summary Confirmation, R. 96-122.)

¹ This appeal is taken from two consolidated actions: Third District Court Cases 080901999 (“1999”) and 080902321 (“2321”). When the district court numbered the record, the court started at page 1 in each file. Therefore, the record page numbers overlap. (For example, there are two distinct pages in the record bearing the number 10.) Because the record for Case 2321 contains only 36 pages and the vast majority of the record citations in this brief refer to the record from Case 1999, the few citations to Case 2321 are expressly noted in the text.

In reviewing a trial court's order confirming, vacating, or modifying an arbitration award, the appellate court grants no deference to the trial court's conclusions of law. More specifically, the appellate court's "scope of review is limited to the legal issue of whether the trial court correctly exercised its authority in confirming, vacating, or modifying an arbitration award." Softsolutions v. Brigham Young University, 2000 UT 46, ¶ 12, 1 P.3d 1095 (citation and internal punctuation omitted).

DETERMINATIVE PROVISIONS

78B-11-118. Witnesses -- Subpoenas -- Depositions -- Discovery.

(3) An arbitrator may permit any discovery the arbitrator decides is appropriate in the circumstances, taking into account the needs of the parties to the arbitration proceeding and other affected persons and the desirability of making the proceeding fair, expeditious, and cost-effective.

78B-11-124. Vacating an award.

(1) Upon motion to the court by a party to an arbitration proceeding, the court shall vacate an award made in the arbitration proceeding if:

- (a) the award was procured by corruption, fraud, or other undue means;
- (b) there was:
 - (i) evident partiality by an arbitrator appointed as a neutral arbitrator;
 - (ii) corruption by an arbitrator; or
 - (iii) misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding;
- (c) an arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to Section 78B-11-116, so as to substantially prejudice the rights of a party to the arbitration proceeding;

- (d) an arbitrator exceeded the arbitrator's authority;
- (e) there was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising an objection under Subsection 78B-11-116(3) not later than the beginning of the arbitration hearing; or
- (f) the arbitration was conducted without proper notice of the initiation of an arbitration as required in Section 78B-11-110 so as to substantially prejudice the rights of a party to the arbitration proceeding.

78B-11-116. Arbitration process.

(1) An arbitrator may conduct an arbitration in a manner the arbitrator considers appropriate for a fair and expeditious disposition of the proceeding. The authority conferred upon the arbitrator includes the power to hold conferences with the parties to the arbitration proceeding before the hearing and, among other matters, determine the admissibility, relevance, materiality, and weight of any evidence.

. . . .

(4) At a hearing under Subsection (3), a party to the arbitration proceeding has a right to be heard, to present evidence material to the controversy, and to cross-examine witnesses appearing at the hearing.

. . . .

STATEMENT OF THE CASE

Nature of the Case

This appeal arises from the trial court's decision to vacate an arbitration award unanimously entered by a three-member panel appointed by the Financial Industry Regulatory Authority on the sole basis that the arbitrators purportedly denied Hicks certain discovery.

On July 14, 2006, UBS filed a Statement of Claim with FINRA to recover the amounts due and owing on certain loans that Hicks had failed and refused to repay.

(Statement of Claim, R. 189-246.) Hicks had previously agreed to arbitrate any and all disputes with UBS and, in so doing, acknowledged in writing that his ability to conduct depositions and obtain other discovery would be more limited in arbitration than in court proceedings. (See Forms U-4/3080, Add. Ex. 2, R. 142-61, especially R. 150, ¶ 5, and R. 160, ¶ 4)

On September 7, 2006, Hicks, by and through his counsel, filed an answer with FINRA containing, among other things, counterclaims for allegedly unpaid investment banking referral fees. (Answer to Statement of Claim and Statement of Counterclaim, R. 248-56.) Hicks also filed a uniform submission agreement in which he voluntarily submitted the entire controversy to arbitration, consented to FINRA's rules and procedures, including its discovery rules, and agreed to abide by and perform any awards rendered by the arbitration panel. (Submission Agreement, Add. Ex. 3, R. 258-59.)

Following a year and a half of proceedings, including extensive and protracted discovery, the arbitrators conducted the evidentiary hearing in Salt Lake City on November 6, 7 and 8, 2007. (See Amended Award, Add. Ex. 4, R. 329.) The arbitrators awarded UBS the sum of \$647,362.56, representing the full principal amount due and owing on the EFLs plus interest, and awarded Hicks the principal sum of \$161,128, representing certain investment banking referral fees.² (Id. at R. 324-31.)

² The arbitrators initially issued the Award on or about November 15, 2007. On or about January 4, 2008, the arbitrators issued an Amended Award that included a provision setting off the amounts it awarded to UBS by the amounts that it awarded to Hicks. (Add. Ex. 4.)

Course of Proceedings and Disposition Below

On February 4, 2008, Hicks filed a petition and motion to vacate the Award.³ Meanwhile, on February 8, 2008, unaware that Hicks had filed a motion to vacate, UBS filed a separate petition to confirm the Award. (R. 1-12 (Case 2321).) The two matters were consolidated before the Honorable Judge Robert P. Faust. On April 8, 2008, UBS filed its Motion for Summary Confirmation of Arbitration Award. (R. 96-122.)

After the trial court heard oral argument on June 13, 2008, it issued a Memorandum Decision, dated July 8, 2008, in which it denied UBS's motion for summary confirmation of the Award and granted Hicks' petition to vacate the Award. (Memorandum Decision, Add. Ex. 5, R. 372-76.) On September 30, 2008, the trial court entered a final order stating that Hicks "was denied critical discovery; denied the opportunity to present material evidence; and denied the opportunity to adequately cross-examine witnesses, all of which substantially prejudiced Hicks' rights during the arbitration proceeding." (Order and Judgment, Add. Ex. 1, R. 411-12.) The trial court never specifically identified any discovery that Hicks was allegedly denied. (*See id.*)

On October 24, 2008, UBS filed a Notice of Appeal indicating that it was appealing both the trial court's decision denying UBS's motion for summary confirmation and the trial court's final order and judgment vacating the Award. (R. 413-15.)

³ Hicks' initial Petition and Motion are not in the appellate record, though they appear on the district court docket report for Case 1999. Hicks' *Amended* Petition and Motion to Vacate Arbitration Award appears at R. 6-21.

Statement of Facts

A. The FINRA Arbitration Process

The Financial Industry Regulatory Authority (“FINRA”), acting under the supervision of the United States Securities and Exchange Commission, is the largest non-governmental regulator for all securities firms doing business in the United States.⁴ (See generally www.finra.org.) In fact, FINRA oversees over 5,000 brokerage firms, approximately 172,000 branch offices and more than 676,000 registered securities representatives. (Id.) FINRA also operates the largest securities dispute resolution forum in the world, the purpose of which is to efficiently and expeditiously resolve employment, business and investment disputes related to the securities industry. (See generally <http://www.finra.org/ArbitrationMediation/index.htm>.) FINRA recruits, trains and manages large rosters of neutral arbitrators selected from a diverse cross-section of professionals with knowledge and experience in the securities industry. (Id.)

In accordance with the legislatively-enacted FINRA arbitration process, discovery is more limited in FINRA arbitration, thereby providing for the speedy and efficient resolution of disputes. FINRA’s Code of Arbitration Procedure (“CAP”) requires, for example, that requests for documents and information must be “specific and relate to the matter in controversy.” See FINRA CAP Rule 13506 (Add. Ex. 6). Requests for information must be “limited to the identification of individuals, entities, and time periods related to the dispute” and be “reasonable in number.” Id. Information requests

⁴ FINRA is the successor to the National Association of Securities Dealers (NASD).

must not “require narrative answers or fact finding.” Id. Standard interrogatories are not permitted. Id.

Moreover, depositions are “strongly discouraged” in FINRA arbitration. See FINRA CAP Rule 13510 (also included in Add. Ex. 6). The arbitrators may permit depositions only in the following “very limited” circumstances:

- To preserve the testimony of ill or dying witnesses;
- To accommodate essential witnesses who are unable or unwilling to travel long distances for a hearing and may not otherwise be required to participate in the hearing;
- To expedite large or complex cases; and
- If the panel determines that extraordinary circumstances exist.

Id.

FINRA’s Arbitrator’s Manual instructs the arbitrators to carefully exercise their judgment when considering a party’s request for depositions and cautions them to bear in mind that arbitration should be efficient and expeditious:

The effective use of discovery tools such as depositions rests in the careful exercise of judgment by the arbitrators. Care should be taken to avoid unnecessary expense or burdens to the parties and to avoid unnecessary delay.

See The Arbitrator’s Manual, August 2007, at p. 12 (Add. Ex. 7).

B. The Parties’ Arbitration Agreement

On or about September 14, 2000, UBS hired Hicks as a Financial Advisor in its Salt Lake City, Utah branch office. (Declaration of Thomas G. Hicks, III, ¶ 2, R. 23.) In connection with his hiring, Hicks executed a Form U-4, in which he agreed “to arbitrate

any dispute, claim, or controversy that may arise between me and my firm . . . that is required to be arbitrated under the rules, constitutions, or by-laws of the [self regulatory organizations, including the NASD] indicated in item 11” (Add. Ex. 2 at R. 150.)

At or around the same time, Hicks executed a Form 3080, in which he acknowledged that discovery is more limited in arbitration and that he would have only a very limited ability to have a court vacate an arbitration award:

Arbitration awards are generally final and binding; a party’s ability to have a court reverse or modify an arbitration award is very limited.

The ability of the parties to obtain documents, witness statements and other discovery is generally more limited in arbitration than in court proceedings.

(Add. Ex. 2 at R. 161 (emphasis added).)

C. The Commencement of the Arbitration

UBS advanced two Employee Forgivable Loans (“EFLs”), totaling over \$1.2 million, to Hicks over the course of his employment with UBS. (See Promissory Notes, R. 163-81.) Each EFL was memorialized in a promissory note, which provided, among other things, that the EFLs were to be forgiven in equal annual installments for as long as Hicks remained employed by UBS. (*Id.* at R. 163, 173.) Each note also provided that, if Hicks’ employment with UBS were terminated, whether voluntarily or involuntarily (other than by reason of disability or death), all unforgiven amounts shall immediately become immediately due and payable. (*Id.*)

On February 27, 2006, Hicks resigned from UBS and joined Morgan Stanley. (Hicks Decl. ¶ 6, R. 24.) At the time, Hicks owed UBS the net principal balance of

\$647,362.56 on the EFLs. (See id. ¶ 7.) Although he resigned from UBS to join a competitor firm, Hicks failed and refused to repay the loans to UBS. (See Statement of Claim, R. 189-95.) Per the parties' arbitration agreement, UBS filed its Statement of Claim with FINRA seeking to recover the amounts due and owing on the EFLs. (Id.)

In response, Hicks, who was at all times represented by counsel, filed an answer with FINRA containing, among other things, counterclaims for allegedly unpaid investment banking referral fees. (See Answer to Statement of Claim and Statement of Counterclaim at R. 251-59.) Specifically, Hicks claimed that he had referred two investment banking clients to UBS: Extra Space Storage and Infinite Energy. (Id.) Hicks sought referral fees in addition to those that UBS had already paid him with respect to transactions involving UBS and Extra Space Storage. (Id.) Hicks also sought referral fees in connection with a purported transaction between UBS and Infinite Energy, for which UBS had declined to pay Hicks any referral fees because that transaction was never completed. (Id.; see also Affirmation, Add. Ex. 8, at ¶ 7, R. 290.)

Hicks also filed a uniform submission agreement in which he voluntarily submitted the entire controversy (including his counterclaims) to arbitration, consented to FINRA's rules and procedures, including its limited discovery rules, and agreed to abide by and perform any awards rendered by the arbitration panel:

The undersigned parties hereby submit the present matter in controversy, as set forth in the attached Statement of Claim, answers, and all related counterclaims and/or third party claims which may be asserted, to arbitration in accordance with the Constitution, By-Laws, Rules, Regulations, and/or Code of Arbitration Procedure of the sponsoring organization.

The undersigned parties further agree to abide by and perform any award(s) rendered pursuant to this Submission Agreement and further agree that a judgment, and any interest due thereon, may be entered upon such award(s) and, for these purposes, the undersigned party hereby voluntarily consents to submit to the jurisdiction of any court of competent jurisdiction which may properly enter such judgment.

(See Uniform Submission Agreement, Add. Ex. 3, at ¶ 4, R. 258 (emphasis added).)

FINRA appointed an arbitration panel consisting of three attorneys who were highly qualified and had expertise in the securities industry. (See Amended Award, Add. Ex. 4, R. 330.) Both parties, including Hicks, agreed to and confirmed the three-member arbitration panel. (See Scheduling Order, R. 261; see generally Amended Award, R. 324-31.)

Hicks, who was represented by counsel in connection with the arbitration throughout its pendency, voluntarily and fully participated in the arbitration and never claimed that his counterclaim should be litigated in a court of law, never requested that the arbitration panel grant him leave to file his counterclaim in court and never applied to any court for a stay of the arbitration or for a ruling that his counterclaim was not subject to arbitration. (See Answer, R. 248-56; Uniform Submission Agreement, Add. Ex. 3, R. 258-59; Amended Award, Add. Ex. 4, R. 324-31.)

D. Discovery in the Arbitration

Although Hicks now claims that he was denied the ability to conduct discovery in the arbitration, that contention is entirely unsupported and belied by the record. In fact, despite the more limited nature of discovery in FINRA arbitration, the arbitrators went to

great lengths in providing Hicks with the ability to conduct the type of discovery not typically permitted in arbitration.

For example, in his counterclaim, Hicks alleged that David Reynolds, a former UBS employee whom UBS did not identify as someone having relevant knowledge related to the case, assured Hicks that he would receive “a close to seven figure commission” for referring an investment banking client to UBS. (See R. 253, ¶ 5.) In support of his request that the arbitrators grant him the ability to depose Mr. Reynolds, Hicks contended that Mr. Reynolds had information crucial to his claims and that, because Mr. Reynolds was no longer employed by UBS and not identified as a potential witness, he would have no other recourse to obtain that information. (Respondent’s Request for Depositions at R. 272-73.) Although depositions are “strongly discouraged” in FINRA arbitration, the arbitrators granted Hicks’ request after considering the parties’ briefs and oral argument. (Discovery Order, March 29, 2007, R. 277-79.) After Hicks’ lawyers contacted Mr. Reynolds and realized that his testimony might not be helpful, and in fact might be detrimental, to his case, Hicks never deposed Mr. Reynolds. (Affidavit of David L. Reynolds at R. 283.)

The arbitrators also provided Hicks with the very information which he now claims was denied. Although the arbitrators denied Hicks’ request to depose UBS’s custodian of records after the issue was fully briefed by the parties and heard by the arbitrators at a hearing, they provided Hicks with the information he sought by other means. Specifically, the arbitrators ordered UBS to provide a sworn affirmation stating either that “there are no responsive documents or information” in response to Hicks’

discovery requests or that UBS's "previously produced documents or information (which shall be itemized by name or description) constitute all the responsive documents or information that was found after the required good faith search." (Order re Cross Motions on Discovery, October 18, 2007, R. 285-86.)

Accordingly, UBS produced an Affirmation detailing its efforts to search for and retrieve documents and information responsive to Hicks' discovery requests, identifying each category of documents that UBS produced as a result of its search and stating that such documents constitute all of the responsive documents that were found after the required good faith search. (Affirmation, Add. Ex. 8.)

Further dispelling any notion that Hicks, as he claimed in support of his motion to vacate, was not granted access to the information he requested, the arbitrators ordered all of UBS's witnesses – including Virginia Weisman, who conducted UBS's search for documents and executed the Affirmation – to appear for testimony at the evidentiary hearing and to have with them all documents "in their custody or to which they have access" pertaining to Hicks' counterclaims. (Discovery Order, at R. 278.) Accordingly, all of UBS's witnesses appeared at and testified the evidentiary hearing, or were made available to appear and testify to the extent that Hicks wanted to examine them, and brought with them all of the documents they had relating to Hicks' counterclaims. (Affidavit of Anthony J. Borrelli ¶ 31, R. 137.) In fact, Hicks presented the testimony of Ms. Weisman as part of his case in chief and examined her regarding both UBS's document production as well as the purported transaction between UBS and Infinite Energy that was never completed. (Id. ¶ 32.)

In addition, in response to Hicks' requests, the arbitrators empowered Hicks to issue subpoenas upon the two companies, Infinite Energy and Extra Space Storage, that he claimed he referred to UBS. (Id. ¶ 25, R. 136.) The only document that Hicks obtained in response to his subpoenas was an apparent term loan facility commitment letter, dated September 19, 2005, relating to the purported transaction between UBS and Infinite Energy. (Id. ¶ 26.) Hicks did not obtain any documents showing that the transaction was ever completed or that UBS earned any fees from it. (Id.)

E. The Evidentiary Hearing

Hicks never claimed that he did not have sufficient time to prepare for the evidentiary hearing. In fact, over the course of the prior eighteen months, the three-member arbitration panel ordered that the evidentiary hearing be scheduled and then postponed for six months in response to Hicks' requests and to accommodate Hicks' claimed need to conduct additional discovery. (See Scheduling Order, R. 261-63; Order Rescheduling Evidentiary Hearing, R. 269-270.)

Although Hicks' primary argument in support of his motion to vacate the Award was that he was unable to depose UBS's custodian of records, he failed to disclose that Virginia Weisman, the person who conducted UBS's search for documents and executed the Affirmation, appeared and testified at the evidentiary hearing. (Borrelli Aff. ¶ 32, R. 137; Affirmation, Add. Ex. 8, R. 288-90.) In fact, Hicks presented her testimony regarding Hicks' counterclaim for alleged unpaid investment banking fees as part of his case-in-chief. (Borrelli Aff. ¶ 32, R. 137.) Among other things, Ms. Weisman testified as to the reasons why the purported term loan facility transaction between UBS and

Infinite Energy was never completed. (See id.; see also Affirmation at R. 290) Ms. Weisman also gave testimony, in response to questioning by Hicks' counsel, regarding UBS's document production. (See id.; see generally Affirmation.)

Hicks, on the other hand, testified that he had no knowledge whatsoever regarding the purported term loan facility transaction between UBS and Infinite Energy. (Borrelli Aff. ¶ 36, R. 138.) Despite having been granted subpoena power by the arbitration panel, Hicks did not present any testimony, sworn affirmations or other evidence from any witnesses associated with either Infinite Energy or Extra Space Storage at the evidentiary hearing. (Id. ¶¶ 37-38.)

Accordingly, as UBS repeatedly stated to Hicks throughout the arbitration proceeding, it was and remains to this day undisputed that *there was no transaction between UBS and Infinite Energy* and that, therefore, Hicks is not entitled to any investment banking referral fees. (Affirmation ¶ 7, R. 290; Letters to Hicks' Counsel at R. 311 and R. 313; Letter to FINRA at R. 318.)

Although Hicks may claim that UBS failed to produce the commitment letter – which, per UBS's sworn Affirmation and Ms. Weisman's testimony, it did not have in its possession – the fact remains that Hicks obtained it in advance of the final hearing, moved it into evidence and had the opportunity to question any of UBS's witnesses about it. (Borrelli Aff. ¶ 27, R. 136.) Hicks also obtained UBS's Affirmation in advance of the final hearing, moved it into evidence and had the opportunity to question any of UBS's witnesses about it. (Id. ¶ 21, R. 135.)

The arbitrators heard Hicks' testimony, Ms. Weisman's testimony as well as the testimony of all of the other witnesses, assessed their credibility and reviewed all of the other evidence, including the Affirmation and the purported commitment letter. (Amended Award, Add. Ex. 4, at R. 327.) The trial court, on the other hand, did none of these things.

F. The Award

The arbitrators awarded certain amounts to both UBS and Hicks. (Id.) Specifically, the arbitrators awarded UBS the full principal amount owed on the EFLs plus interest, totaling \$647,362.56. (Id.) The arbitrators awarded Hicks the sum of \$161,128, representing additional investment banking fees with respect to transactions involving UBS and Extra Space Storage. (Id.) The arbitrators set off the amount awarded to UBS by the amount awarded to Hicks, yielding a net result of an Award in favor of UBS in the amount of \$575,436.28 (as of February 8, 2008). (Id. at R. 328; see also Borrelli Aff. ¶ 43, R. 138.)

The arbitrators did not award Hicks any amounts in connection with the purported transaction between UBS and Infinite Energy that, as shown by the undisputed evidence adduced at the evidentiary hearing, was never completed. (Amended Award at R. 327.)

G. The Trial Court Vacated The Award

Instead of satisfying the Award, Hicks filed a motion to vacate the entire Award – including the amounts that UBS was awarded, which Hicks has *never* disputed – on the basis that the arbitrators purportedly denied his requests for two discovery items: (1) the deposition of UBS's custodian of records; and (2) certain metadata relating to a

PowerPoint presentation regarding UBS's investment banking referral fee policy. (Mem. Supp. Amended Pet. and Mot. to Vacate Arbitration Award, R. 8-21.)

On April 8, 2008, UBS filed its Motion for Summary Confirmation of Arbitration Award, arguing that (1) a trial court's potential disagreement with the arbitrators' denial of a party's discovery request is not a legally permissible reason for vacating an arbitration award, and (2) even if it were, the arbitrators resolved the purported discovery "issue" in this case by providing Hicks with the information he sought by alternate means. (Mem. Supp. UBS's Mot. for Summ. Conf. of Arbitration Award, R. 99-121.) UBS also pointed out that, while Hicks claimed that he was "unjustly denied" access to the metadata, he had never even raised that issue to the arbitrators and they had never ruled upon it. (*Id.* at R. 120-21; see also Borrelli Aff. ¶ 29, R. 137.)

After the trial court heard oral argument on June 13, 2008, it issued a Memorandum Decision, dated July 8, 2008, in which it denied UBS's motion for summary confirmation of the Award, granted Hicks' petition to vacate the Award and instructed Hicks' counsel to prepare a final order that "should specifically outline the discovery which was denied to [Hicks] and explain the basis for the Court's decision that [Hicks] was denied the opportunity to present material evidence." (Memorandum Decision, Add. Ex. 5, at R. 375.)

Hicks, however, submitted a proposed final order that neither specifically outlined the discovery he was purportedly denied nor explained the basis for the trial court's decision that he was denied the opportunity to present material evidence. ([Proposed] Order and Judgment, Add. Ex. 9, R. 385-89.) Instead, Hicks submitted a proposed final order to

the trial court in which he raised five purported discovery items that he supposedly requested in the arbitration and that the arbitrators supposedly denied him. (See id.) Despite his representations to the trial court, however, Hicks *never* presented four of the five discovery “issues” to the arbitrators and the arbitrators *never* ruled upon such “issues.” (Id.) As UBS pointed out in objecting to Hicks’ final order, the *only* discovery item that the arbitrators denied Hicks was the deposition of UBS’s custodian of records. (See Objections to Proposed Order and Judgment, Add. Ex. 10, R. 377-83.) In fact, Hicks did not even raise most of these purported discovery “issues” in support of his motion to vacate the Award. (See id.)

The trial court issued a Minute Entry on September 9, 2008 properly rejecting Hicks’ proposed final order. (Minute Entry, Add. Ex. 11, R. 408-10.) However, despite its prior instructions in its Memorandum Decision for Hicks’ counsel to “specifically outline” the discovery that Hicks was allegedly denied and to “explain the basis” for the court’s decision that Hicks was purportedly denied the opportunity to present material evidence, the trial court stated in its Minute Entry that the final order that “should be simplified to reflect . . . in a general way, that the panel made certain discovery decisions which resulted in [Hicks] being denied access to certain key witnesses and information critical to his case.” (Id. at R. 408.)

As a result, the final order states that Hicks “was denied critical discovery; denied the opportunity to present material evidence; and denied the opportunity to adequately cross-examine witnesses, all of which substantially prejudiced Hicks’ rights during the arbitration proceeding.” (Order and Judgment, Add. Ex. 1, at R. 411-12.) The trial court

never identified any specific discovery that Hicks was allegedly denied by the arbitration panel. (See id.; see also Memorandum Decision, Add. Ex. 5.) Nor did the trial court identify any instances in which the arbitrators prevented any testimony, excluded any evidence or limited any cross-examination. (Id.) Accordingly, the language contained in the final order provides no guidance to an arbitration panel if the arbitration were to be re-tried. (Order and Judgment, Add. Ex. 1.)

SUMMARY OF ARGUMENT

Under Utah law, judicial review of arbitration awards is extremely narrow in scope, highly deferential to the arbitrators and limited to the statutory grounds for review. A trial court is not permitted to substitute its judgment for that of the arbitrators. Discovery matters, in particular, are left within the discretion of the arbitrators.

Here, the trial court committed plain error by vacating the Award on the sole basis that it disagreed with the arbitrators' decision not to grant Hicks' request to depose UBS's custodian of records. Moreover, the trial court substituted its judgment for that of the arbitrators with regard to a discovery dispute that was fully briefed and argued by the parties during the arbitration and considered and resolved by the arbitrators.

The trial court's final order purports to provide three reasons for its decision in stating that Hicks was: (i) "denied critical discovery"; (ii) "denied the opportunity to present material evidence"; and (iii) "denied the opportunity to adequately cross-examine witnesses." However, the trial court did not apply any of these three reasons to the facts of this case or even explain exactly what the arbitrators did (or did not do) that was

apparently so improper as to result in Hicks' rights being "substantially prejudiced." In fact, the trial court's three purported reasons have no basis in the record.

As to the trial court's first reason, the purported denial of "critical discovery" is *not* one of the statutorily-enumerated grounds on which an arbitration award can be vacated. On the contrary, Section 118 of the Utah Arbitration Act provides that an arbitrator "may permit any discovery the arbitrator decides is appropriate in the circumstances."

Moreover, despite the more limited nature of discovery in FINRA arbitration, the arbitrators went to great lengths to provide Hicks with access to all of the information he sought. In fact, the arbitrators resolved Hicks' request for the deposition of UBS's custodian of records – the *only* discovery that they denied Hicks – by ordering UBS to produce all documents responsive to Hicks' discovery requests, to describe in an affidavit its efforts to do so and to have the corporate representative who conducted UBS's search for documents testify at the evidentiary hearing.

The trial court's second and third reasons for vacating the Award refer to Section 116 of the Utah Arbitration Act, which governs the manner in which arbitrators may conduct a hearing. Hicks, however, has never disputed the manner in which the arbitrators conducted the evidentiary hearing. Moreover, although an arbitration award may be vacated under the Act if a party is denied "the opportunity to present material evidence" or "the opportunity to adequately cross-examine witnesses," the party seeking to establish those grounds must show that its rights were "*substantially prejudiced*." The trial court, however, failed to hold Hicks to that high standard. In fact, the trial court did

not identify a single instance in which the arbitrators prevented Hicks (or any other witness) from testifying, excluded material evidence or limited cross-examination. That is because the arbitrators never did any of these things. Accordingly, the trial court's second and third reasons for vacating the Award are inapposite.

In short, the trial court vacated the Award for reasons that are impermissible, unsubstantiated and inapplicable. Accordingly, UBS respectfully requests that this Court reverse the trial court's order and judgment vacating the Award and direct that the Award be confirmed and that judgment be entered in UBS's favor.

ARGUMENT

I. THE TRIAL COURT INCORRECTLY EXERCISED ITS AUTHORITY IN VACATING THE AWARD ON THE SOLE BASIS THAT THE ARBITRATORS DID NOT PERMIT HICKS TO DEPOSE UBS'S CUSTODIAN OF RECORDS

This entire matter can be resolved by answering a single, straightforward legal question: Whether an arbitration award may be vacated on the sole basis that the arbitration panel did not allow the losing party to conduct certain discovery. Based on the plain language of the Utah Arbitration Act, the answer is clearly "no."

When Hicks agreed to arbitrate any and all disputes with UBS, Hicks (and UBS) willingly gave up the right to the sort of extensive discovery mechanisms that he could have pursued in court. The trial court, however, refused to hold Hicks to this agreement and vacated UBS's arbitration award against Hicks on the ground that the arbitrators did not allow Hicks to depose UBS's custodian of records – despite the fact that both the parties' arbitration agreement and the applicable arbitration rules expressly limit the

scope of discovery and did not require the panel to allow such a deposition, despite the fact that this purported discovery issue was fully briefed and argued by the parties during the arbitration and considered and resolved by the arbitrators and despite the fact that the Utah Arbitration Act expressly leaves discovery matters within the discretion of the arbitrators.

Even if the trial court disagreed with the arbitrators' discovery decisions, including their decision not to allow Hicks to depose UBS's custodian of records, that disagreement is not a valid basis for vacating the Award. Under Section 124(1) of the Act, an arbitration award may only be vacated if the party challenging the award establishes one or more of the following:

- (a) the award was procured by corruption, fraud, or other undue means;
- (b) there was:
 - (i) evident partiality by an arbitrator appointed as a neutral arbitrator;
 - (ii) corruption by an arbitrator; or
 - (iii) misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding;
- (c) an arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to Section 78B-11-116, so as to substantially prejudice the rights of a party to the arbitration proceeding;
- (d) an arbitrator exceeded the arbitrator's authority;
- (e) there was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising an objection under Subsection 78B-11-116(3) not later than the beginning of the

arbitration hearing; or

- (f) the arbitration was conducted without proper notice of the initiation of an arbitration as required in Section 78B-11-110 so as to substantially prejudice the rights of a party to the arbitration proceeding.

Utah Code Ann. § 78B-11-124(1). Section 124(1) does *not* include the trial court's disagreement with an arbitrators' denial of a discovery request as a basis for vacating an award.

The trial court attempted to get around this problem by stating that the arbitrators “conducted the hearing contrary to Section 78B-11-116” and did not, as that section provides, allow Hicks “to present evidence material to the controversy” and “to cross-examine witnesses appearing at the hearing.” Even if those provisions were applicable to the facts of this case (which they are not), in order to have the Award vacated, Hicks was also required, pursuant to Section 124 of the Act, to show that his rights were “*substantially prejudiced*.” Although the trial court quotes this standard in its final order, it fails to apply it to the facts of this case and fails to explain exactly what the arbitrators did (or did not do) that was apparently so improper as to “substantially prejudice” Hicks’ rights.

In fact, Hicks was *not* denied the opportunity to present evidence or cross-examine witnesses and his rights were *not* substantially prejudiced. There is absolutely nothing in the record to suggest that the arbitrators prevented Hicks (or any other witness) from testifying, excluded material evidence or limited cross-examination.

Despite the fact that Hicks submitted a proposed final order to the trial court stating that the arbitrators had “denied” him discovery materials that he never even requested, the *only* discovery that the arbitrators denied Hicks was the deposition of UBS’s custodian of records. (See [Proposed] Order and Judgment, Add. Ex. 9, R. 385-89; Objections to Proposed Order and Judgment, Add. Ex. 10, R. 377-83.) But having a discovery request denied is not the same thing as being denied the right to present evidence or cross-examine witnesses. Indeed, Section 116(4) applies only to the manner in which the arbitrators may conduct a hearing and does not make any reference to discovery matters or other pre-hearing proceedings. And it certainly does not bestow upon a party to an arbitration an unfettered right to conduct discovery. When he joined UBS as a Financial Advisor, Hicks expressly acknowledged and agreed that “[t]he ability of the parties to obtain documents, witness statements and other discovery is generally more limited in arbitration than in court proceedings.” (Add. Ex. 2 at R. 161.) Having willingly agreed to forego more extensive discovery processes when he agreed to arbitrate any and all disputes with UBS, Hicks is in no position now to complain that he was not given all the discovery he wanted.

Moreover, another section of the Act makes it absolutely clear that the trial court’s disagreement with the arbitrators’ denial of a discovery request is *not* a basis for vacating an arbitration award. In fact, Section 118 of the Act expressly leaves it within the arbitrators’ sole discretion to determine whether and to what extent discovery is to be allowed:

An arbitrator *may* permit any discovery *the arbitrator decides is appropriate in the circumstances*, taking into account the needs of the parties to the arbitration proceeding and other affected persons and the desirability of making the proceeding fair, expeditious, and cost-effective.

Utah Code Ann. § 78B-11-118(3) (emphasis added). Section 118 thus clearly reflects the Legislature’s intent to leave discovery in the hands of the arbitrators, who, after all, are in a much better position to determine what discovery is actually “appropriate” given the facts and circumstances of the case before them.

If the arbitrators’ denial of a discovery request were tantamount to the denial of a party’s right to present evidence or cross-examine witnesses under Section 116(4), and thus a basis for vacating an award under Section 124(1)(c), then Section 118 would be rendered meaningless. In interpreting statutes, however, a court’s role is to “avoid interpretations that will render portions of a statute superfluous or inoperative.” Hall v. Dep’t of Corrections, 2001 UT 34, ¶ 15, 24 P.3d 958. Moreover, in interpreting potentially conflicting statutes, specific provisions take precedence over general provisions. Id. The trial court’s apparent interpretation of Section 116(4) violates both of these important precepts.

The trial court committed plain error in violating the express provisions of the Utah Arbitration Act and vacating the Award on the sole basis that the arbitrators did not permit Hicks to depose UBS’s custodian of records. As there was no basis to vacate the Award, it should be confirmed as a judgment.

II. THERE WAS ABSOLUTELY NO BASIS IN THE RECORD FOR THE TRIAL COURT TO CONCLUDE THAT HICKS WAS DENIED “CRITICAL DISCOVERY”

Even if the purported denial of “critical discovery” were a valid basis to vacate an arbitration award, there was absolutely no basis in this case for the trial court to conclude that the arbitrators denied Hicks “critical discovery.” In fact, the trial court did not identify *any* discovery that Hicks was purportedly denied. As the *only* discovery that the arbitrators denied Hicks was the deposition of UBS’s custodian of records, one can only assume that this is the sole basis on which the trial court vacated the Award.⁵ The arbitrators, however, were well within their authority in denying Hicks’ request.

Consistent with Section 118 of the Utah Arbitration Act, FINRA’s discovery rules and arbitration guidelines provide that it is within the arbitrators’ sole discretion to determine, given the facts and circumstances before them, the nature and extent of appropriate discovery. Indeed, FINRA’s Arbitrator’s Manual instructs the arbitrators to carefully exercise their judgment when considering a party’s request for depositions and cautions them to bear in mind that arbitration should be efficient and expeditious:

The effective use of discovery tools such as depositions rests in the careful exercise of judgment by the arbitrators. Care

⁵ Although the trial court stated, in its Memorandum Decision, that “the panel’s decision hindered [Hicks’] ability to present material evidence and his ability to adequately cross-examine Ms. Weisman, who was clearly a key witness in the arbitration proceeding,” the trial court never identified the “panel’s decision” to which it referred, never explained the basis for its decision that Hicks was denied material evidence (as it indicated it would do in its final order) and never explained the basis for its decision that Hicks, who examined Ms. Weisman as part of his case in chief, was hindered in his ability to cross-examine her. (See Mem. Dec., Add. Ex. 5, R. 372-76; Order & Judgment, Add. Ex. 1, R. 411-12.)

should be taken to avoid unnecessary expense or burdens to the parties and to avoid unnecessary delay.

See The Arbitrator's Manual, August 2007, at p. 12 (Add. Ex. 7).

Notably, there is no basis to conclude that Hicks was *entitled* to depose UBS's custodian of records. On the contrary, FINRA's Code of Arbitration Procedure ("CAP") expressly states that *depositions are "strongly discouraged" in FINRA arbitration*. See FINRA CAP Rule 13510 (Add. Ex. 6) (emphasis added). In fact, FINRA arbitrators may permit depositions only in "very limited" circumstances.⁶ Having considered the parties' briefs and oral argument, the arbitrators determined that none of those circumstances applied to Hicks' request to depose UBS's custodian of records.

But the arbitrators went even further and resolved this purported "issue" by providing Hicks with the information he sought by alternate means. In lieu of granting Hicks' request to depose UBS's custodian of records, the arbitrators ordered UBS to produce an Affirmation stating either that "there are no responsive documents or information" in response to Hicks' discovery requests or that UBS's previously produced documents or information (which shall be itemized by name or description) constitute all the responsive documents or information that was found after the required good faith search." (R. 285-86.)

⁶ Under FINRA CAP 13510, depositions are allowed only to preserve the testimony of ill or dying witnesses; To accommodate essential witnesses who are unable or unwilling to travel long distances for a hearing and may not otherwise be required to participate in the hearing; To expedite large or complex cases; or "[i]f the panel determines that extraordinary circumstances exist." (Add. Ex. 6.)

In accordance with the arbitrators' order, UBS produced prior to the evidentiary hearing an Affirmation detailing its efforts to search for documents and information responsive to Hicks' discovery requests, identifying each category of documents that it produced as a result of its search and stating that such documents constitute all of the responsive documents that were found after the required good faith search. (Add. Ex. 8, R. 288-90.)

At the evidentiary hearing, Hicks moved the Affirmation into evidence and had the opportunity to question any of UBS's witnesses about it. (Borrelli Aff. ¶ 21, R. 135.) In fact, despite his claims to the trial court in support of his motion to vacate the Award, Hicks questioned Virginia Weisman, the corporate representative who conducted UBS's search for documents and executed the Affirmation, regarding, among other things, UBS's document production. (*Id.* ¶ 32; Affirmation, R. 288-90.) Accordingly, Hicks received (or at least had access to) the very information that he claimed was denied him – along with all of the other discovery and information to which the arbitrators provided him access.

In short, not only did the trial court improperly vacate the Award on the basis of a purported discovery issue, it substituted its judgment for that of the arbitrators with respect to an issue that was considered, resolved and rendered moot by the arbitrators.

III. UTAH'S STRONG PUBLIC POLICY FAVORING ARBITRATION MANDATES THE REVERSAL OF THE TRIAL COURT'S DECISION VACATING THE AWARD

Utah has a strong public policy mandate that liberally encourages arbitration because it is expeditious and efficient. See, e.g., Allred v. Educators Mut. Ins. Ass'n of

Utah, 909 P.2d 1263, 1268 (Utah 1996) (Utah Arbitration Act “reflects long-standing public policy favoring speedy and inexpensive methods of adjudicating disputes”). Accordingly, the Utah Supreme Court has instructed that trial courts should undertake only an extremely narrow review of arbitration awards. Buzas Baseball v. Salt Lake Trappers, 925 P.2d 941, 946 (Utah 1996) (standard of review is “highly deferential to the arbitrator”); see also Utility Trailer Sales v. Fake, 740 P.2d 1327, 1329 (Utah 1987) (“[J]udicial review of arbitration awards should not be pervasive in scope or susceptible to repetitive adjudications, but should be limited to the statutory grounds and procedures for review”).⁷ Otherwise, “the speedy resolution of grievances by private mechanisms would be greatly undermined.” Buzas, 925 P.2d at 947-48.

In accordance with these well-established principles, the Utah Arbitration Act provides that discovery matters are left entirely within the arbitrators’ discretion and that an arbitration panel’s denial of a party’s discovery request is not a permissible ground on which an arbitration award may be vacated. See Buzas, 925 P.2d at 947-48 (“the trial court may not substitute its judgment for that of the arbitrator, nor may it modify or vacate an award because it disagrees with the arbitrator’s assessment”).

Allowing an arbitration award to be vacated because the losing party was denied discovery would defeat the important, legislatively-enacted purpose of arbitration as a speedy and inexpensive means to resolve disputes. Indeed, any arbitration award could

⁷ The United States Supreme Court recently held that, under the Federal Arbitration Act, arbitration awards are not subject to general review for an arbitrator’s legal errors. Hall Street Associates, LLC v. Mattel, Inc., 552 U.S. ___, 128 S.Ct. 1396 (2008).

be vacated upon the losing party's *ex post facto* claim that he should have been entitled to conduct additional discovery and that such additional discovery was important to his case. At a minimum, a great number of arbitration awards would become subject to detailed, time-consuming, and expensive judicial review.

This why the law is so clear in providing that arbitration awards are subject to only limited judicial review and that courts should not substitute their judgment for that of the arbitrators. Otherwise, the whole point of arbitration would be lost.

The Tenth Circuit recognized this in a case involving similar facts as the case at bar. In Jenkins v. Prudential-Bache Securities, 847 F.2d 631, 632-33 (10th Cir. 1988), the district court affirmed an arbitration award ordering securities brokers, who resigned to join a competitor, to repay their employee forgivable loans. Like the district court, the Tenth Circuit refused to second-guess the arbitrators' determinations:

[T]he sole question for our consideration is whether the arbitration panel ignored the plain language of the contract in refusing [the brokers'] interpretation of the agreement ***But this is a review of an arbitration award. [The brokers] agreed to have an arbitration panel interpret their contracts.*** Even if the panel misread the contract, we may not reverse for that reason alone. The court cannot say that the panel ignored the plain language of the contract, and the district court's decision must therefore be affirmed.

Id. at 635 (emphasis added).

Similarly, in this case, the parties agreed to have an arbitration panel adjudicate all of their disputes, claims and controversies. They also agreed that the arbitration panel would determine the nature and extent of discovery and expressly acknowledged that such discovery would be more limited in arbitration. Even if it disagreed with the

arbitrators' determination of a discovery issue, the trial court should not have vacated the arbitration award on that basis. Accordingly, the trial court's order and judgment vacating the Award should be reversed.

CONCLUSION

The Utah Arbitration Act provides specific grounds on which an arbitration award may be vacated. A trial court's disagreement with an arbitration panel's determination and resolution of a discovery dispute is not one of them. On the contrary, the Act provides that discovery matters should be left within the sole discretion of the arbitrators.

Even if it were a valid ground for vacating the Award (which it is not), there was absolutely no basis in the record for the trial court to conclude that Hicks was denied "critical discovery." Nor was there any basis whatsoever in the record to conclude that the arbitrators denied Hicks "the opportunity to present material evidence" or "the opportunity to adequately cross-examine witnesses," much less that Hicks' rights were "*substantially prejudiced*."

In connection with its review of the Award, the trial court completely reversed the parties' respective burdens. The trial court did not require Hicks, the party seeking to vacate the Award, to demonstrate any of the statutorily-enumerated grounds for vacating the Award. Instead, UBS was essentially forced to show that such grounds did *not* exist.

In short, the trial court incorrectly exercised its authority by failing to give appropriate deference to the arbitrators and by vacating the Award for reasons that are impermissible, unsubstantiated and inapplicable. Accordingly, UBS respectfully requests that this Court:

- (i) Reverse the trial court's order and judgment denying UBS's motion for summary confirmation of the Award;
- (ii) Reverse the trial court's order and judgment granting Hicks' petition to vacate the Award; and
- (iii) Direct that the Award be confirmed and that Judgment be entered pursuant to the Award in UBS's favor and against Hicks in the amount of \$575,436.28, plus pre-judgment interest, post-judgment interest, costs, and attorney fees as allowed by contract and by Utah Code Ann. § 78B-11-126.

DATED: March 4, 2009

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the _____ day of March, 2009, I did cause two true and correct copies of the foregoing **OPENING BRIEF OF APPELLANT** to be served via first-class mail, postage prepaid, upon the following:

Greggory J. Savage, Esq.
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ADDENDUM OF EXHIBITS

1. Order and Judgment Vacating Arbitration Award and Directing Rehearing, September 30, 2008, R. 411-412
2. Forms U-4/3080, R. 142-161
3. Uniform Submission Agreement, R. 258-259
4. Amendment to Award, R. 324-331
5. Memorandum Decision, July 8, 2008, R. 372-376
6. FINRA CAP Rules 13506, 13510
7. The Arbitrator's Manual, August 2007
8. Affirmation, R. 288-290
9. [Proposed] Order and Judgment Vacating Arbitration Award and Directing Rehearing, R. 385-389
10. Objections to Proposed Order and Judgment Vacating Arbitration Award and Directing Rehearing, R. 377-383
11. Minute Entry, September 9, 2008, R. 408-410